RECORD AND BRIEFS

No. 16-32

In the Supreme Court of the United States

KINDRED NURSING CENTERS LIMITED PARTNERSHIP, DBA WINCHESTER CENTRE FOR HEALTH AND REHABILITATION, NKA FOUNTAIN CIRCLE HEALTH AND REHABILITATION, ET AL.,
Petitioners,

v.

JANIS E. CLARK AND BEVERLY WELLNER, ET AL.,
Respondents.

On Writ of Certiorari to the Kentucky Supreme Court

BRIEF FOR AARP, AARP FOUNDATION, JUSTICE IN AGING, THE NATIONAL CONSUMER VOICE FOR QUALITY LONG-TERM CARE, AND NURSING HOME OMBUDSMAN AGENCY OF THE BLUEGRASS AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

William Alvarado Rivera*
**Counsel of Record*
AARP FOUNDATION LITIGATION
601 E Street, N.W.
Washington, D.C. 20049
Tel. (202) 434-3392
warivera@aarp.org
Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTERESTS OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 4

I. THE SCOPE OF AUTHORITY DELEGATED TO AN AGENT UNDER A POWER OF ATTORNEY MUST BE VIEWED WITH THE PRINCIPAL'S OBJECTIVES IN MIND 4

II. THE KENTUCKY SUPREME COURT ARTICULATED A RULE THAT APPROPRIATELY REQUIRES A RIGOROUS STANDARD FOR AN AGENT'S AUTHORITY TO WAIVE FUNDAMENTAL RIGHTS 9

III. THE RIGHT TO ACCESS THE COURTS IS CRITICAL TO THE MANY VICTIMS OF ELDER ABUSE AND NEGLECT IN NURSING FACILITIES 15

CONCLUSION 20

TABLE OF AUTHORITIES

CASES

Am. Health Care Ass'n v. Burwell, No. 16-cv-00233, 2016 U.S. Dist. LEXIS 154110 (N.D. Miss. Nov. 7, 2016) 13, 14

AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011) 13

Dishman v. Dishman, 2015 Ky. App. Unpub. LEXIS 874 (May 1, 2015) 12

Friedman v. Hebrew Home for the Aged at Riverdale, 13 N.Y.S.3d 896 (N.Y. App. Div. 2015) 1

Kindred Health Ctrs. Ltd. v. Clark, No. 16-32 (Dec. 7, 2016) 5, 12

Kindred Healthcare, Inc. v. Goodman, No. 2014-CA-000589, 2015 Ky. App. Unpub. LEXIS 348 (May 15, 2015) 10, 11

Kindred Nursing Ctrs. v. Clark, 2013-SC-000426, slip op. (Ky. Sept. 24, 2015) 10

Marmet Health Care Ctr., Inc. v. Brown, 565 U.S. 530 (2012) 12

Ping v. Beverly Enters., 376 S.W.3d 581 (Ky. 2012) 6, 10

Preferred Care, Inc. v. Howell, No. 16-13-ART, 2016 U.S. Dist. LEXIS 110495 (E.D. Ky. Aug. 19, 2016) 5

Strausberg v. Laurel Healthcare Providers, 304 P.3d 409 (N.M. 2013) 1

Taylor v. Extendicare Health Facilities, 147 A.3d 490 (Pa. 2016) 1

U.S. Fid. & Guar. Co. v. McGinnis Admin., 147 Ky. 781 (Ky. 1912) 10

STATUTES, RULES AND REGULATIONS

Ky. Rev. Stat. Ann. (LexisNexis 2016)
§ 311.621(8) 6
§ 311.629(1) 6

TREATISES

Restatement (Third) of Agency § 2.02(1) (Am. Law Inst. 2006) 6

LEGISLATIVE HISTORY

Elder Justice and Protection: Stopping the Abuse: Hearing Before the Subcomm. on Aging of the Comm. on Health, Educ., Labor, and Pensions, 108th Cong. (Aug. 20, 2003) 16

Kelly Rice-Schild, *The Fairness in Nursing Home Arbitration Act: Hearing on S. 2838 Before the S. Subcomm. on Antitrust, Competition Pol'y, and Consumer Rights of the S. Comm. on the Judiciary and the Spec. Comm. on Aging*, 110th Cong., 2 (June 18, 2008), http://www.ahcancal.org/advocacy/testimonies/Testimony/AHCA_NCAL_StatementofKRSonArbitration.pdf 18

MISCELLANEOUS

AARP Research Grp., *Where There Is a Will: Legal Documents Among the 50+ Population* (Apr. 2000), http://assets.aarp.org/rgcenter/econ/will.pdf 5

Aon Risk Sols., *Long Term Care General Liability and Professional Liability Actuarial Analysis*, 10 (2015), https://www.ahcancal.org/research_data/liability/Documents/2015%20General%20Liability%20and%20Professional%20Liability%20Actuarial%20Analysis%20Report.pdf 18, 19

Ctrs. for Medicare and Medicaid Servs., U.S. Dep't of Health and Human Servs., *Final Rule: Medicare and Medicaid Programs, Reform of Requirements for Long-Term Care Facilities*, 81 Fed. Reg. 68,688 (Oct. 4, 2016) 14, 20

Ctrs. for Medicare and Medicaid Servs., U.S. Dep't of Health and Human Servs., *Nursing Home Data Compendium 2015 Edition* (2015), https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/CertificationandCompliance/Downloads/nursinghomedatacompendium_508-2015.pdf 15, 16

John C. Craft, *Preventing Exploitation and Preserving Autonomy: Making Springing Powers of Attorney the Standard*, 44 U. Balt. L. Rev. 407 (Summer 2015) 7, 8, 11

David J. Doukas, M.D. et al., *Living Wills and Other Advance Directives for You and Your Family* (2d ed. 2007) 7

Brenna Kelly, *Systematic Review: Individuals' Goals for Surrogate Decision-Making*, 60 J. Am. Geriatr. Soc. 884 (May 2012) 7

Nina A. Kohn, *Elder Empowerment as a Strategy for Curbing the Hidden Abuses of Durable Powers of Attorney*, 59 Rutgers L. Rev. 1 (Fall 2006) 8

Jill L. Lens, *Tort Law's Deterrent Effect and Procedural Due Process*, 50 Tulsa L. Rev. 115 (2014) 19

Nat'l Research Council, *Elder Mistreatment: Abuse, Neglect, and Exploitation in an Aging America* (Richard J. Bonnie & Robert B. Wallace eds., 2003) 15, 16

Laura M. Owings & Mark N. Geller, *The Inherent Unfairness of Arbitration Agreements in Nursing Home Admission Contracts*, 43 Tenn. B.J. 20 (2007) 13

Andrew F. Popper, *In Defense of Deterrence*, 75 Alb. L. Rev. 181 (2011) 19

Jennifer L. Rhein, Note: *No One in Charge: Durable Powers of Attorney and the Failure to Protect Incapacitated Principals*, 17 Elder L.J. 165 (2009) 11

Christopher B. Rosnick & Sandra L. Reynolds, *Thinking Ahead: Factors Associated with Executing Advance Directives*, 15 J. of Aging and Health 409 (2003) 8

David Shieh, *Unintended Side Effects: Arbitration and the Deterrence of Medical Error*, 89 N.Y.U. L. Rev. 1806 (2014) 19

U.S. Admin. on Aging, *2013 National Ombudsman Reporting System Data Tables*, Tbl. B-2, Tab A (2013), https://aoa.acl.gov/AoA_Programs/Elder_Rights/Ombudsman/National_State_Data/2013/Index.aspx 16

U.S. Gov't Accountability Office, GAO-07-241, *Efforts to Strengthen Federal Enforcement Have Not Deterred Some Homes from Repeatedly Harming Residents* 26 (2007), http://www.gao.gov/new.items/d07241.pdf 17, 18

U.S. Gov't Accountability Office, GAO-07-794T, *Nursing Home Reform: Continued Attention Is Needed to Improve Quality of Care in Small but Significant Share of Homes* 9 (2007), http://www.gao.gov/new.items/d07794t.pdf 17

U.S. Gov't Accountability Office, GAO-11-571, *Nursing Homes: Private Investment Homes Sometimes Differed from Others in Deficiencies, Staffing, and Financial Performance*, at Highlights (2011), http://www.gao.gov/assets/330/321067.pdf 18

Denese A. Vlosky et al., *"Say-so" As a Predictor of Nursing Home Readiness*, 93 J. Fam. & Consumer Sci. 59 (2001) 13

Linda S. Whitton, *Understanding Duties and Conflicts of Interest—A Guide for the Honorable Agent*, 117 Penn. St. L. Rev. 1037 (2013) 12

INTERESTS OF AMICI CURIAE[1]

AARP is a nonprofit, nonpartisan organization dedicated to fulfilling the needs and representing the interests of people age fifty and older. AARP fights to protect older people's financial security, health, and well-being. AARP's charitable affiliate, AARP Foundation, creates and advances effective solutions that help low-income individuals fifty and older secure the essentials. Among other things, AARP and AARP Foundation advocate against the enforcement of pre-dispute arbitration agreements against nursing facility residents, including through participation as amicus curiae in state courts. *E.g.*, *Taylor v. Extendicare Health Facilities*, 147 A.3d 490 (Pa. 2016); *Friedman v. Hebrew Home for the Aged at Riverdale*, 13 N.Y.S.3d 896 (N.Y. App. Div. 2015); *Strausberg v. Laurel Healthcare Providers*, 304 P.3d 409 (N.M. 2013).

Justice in Aging is a national, nonprofit law organization that uses the power of law to fight senior poverty by securing access to affordable health care, economic security, and the courts for older adults with limited resources. In both policy advocacy and technical assistance, Justice in Aging supports the decision-making rights of older adults,

---

[1] No counsel for a party authored this brief in whole or in part or made a monetary contribution to fund the preparation or submission of this brief. No persons other than amici, their members or their counsel made such a monetary contribution. Counsel of record received timely notice of amici's intent to file this brief under Rule 37, and all parties consented to the filing of this brief.

emphasizing the importance of honoring an individual's intent and preferences. Justice in Aging's attorneys are nationally recognized experts on the rights of nursing facility residents, authoring the legal treatise Long-Term Care Advocacy (Matthew Bender and Co.), and have long counseled consumers and their advocates about common but improper nursing facility practices. The organization's policy advocacy and work with consumers and advocates each would be advanced by a ruling affirming the decision of the Kentucky Supreme Court.

The National Consumer Voice for Quality Long-Term Care (Consumer Voice) is a national nonprofit membership organization whose members including residents of long-term care facilities, residents' families, long-term care ombudsmen, consumer advocates, and other groups and individuals who are dedicated to improving quality in long-term care and protecting the rights of the 1.5 million residents of nursing and other long-term care facilities in the United States. Since 1975, Consumer Voice has represented residents' interests before federal and state legislative and administrative entities and in federal and state courts. Specific policy goals of the Consumer Voice are to improve the quality of life and protect the rights of residents of long-term care facilities in the United States.

The Nursing Home Ombudsman Agency of the Bluegrass (NHOA) is a Kentucky-based nonprofit agency that provides advocacy and ombudsman services to residents of long-term care. NHOA

operates the Kentucky Long-Term Care Ombudsman Program and for over 35 years has been advocating on behalf of residents who experience poor care. The Kentucky Long-Term Care Ombudsman program serves 34,000 Kentuckians living in Nursing, Personal Care, and Family Care homes each year. Our ombudsmen worked to resolve over 7,400 long-term care consumer complaints during the past year and 5.9% were related to abuse and neglect. Informing residents of their rights, preventing abuse and neglect and improving care are goals of NHOA.

Amici submit this brief because the Kentucky Supreme Court's decision below correctly held that the question of whether a health care agent acted within his or her authority—and, therefore, whether an agreement to arbitrate was properly formed—must be carefully scrutinized to ensure that rights critical to the protection of older adults in long-term care facilities are not unintentionally waived.

SUMMARY OF ARGUMENT

The scope of an agent's authority depends on the principal's intent in granting that authority. Generally speaking, older adults seeking to delegate the authority to manage their affairs want someone to manage the practicalities of their day-to-day lives, not to waive substantive rights of which they are either unaware or do not foresee a need to exercise. When an operative power of attorney document broadly references an agent's ability to "contract" on the principal's behalf, such references must be

carefully examined in context to determine the principal's intent. As discussed in this brief, the question of the scope of an agent's authority and the court's power to infer authority involve fact-intensive analyses best handled in accordance with traditional state law principles of agency.

The stakes are high for agents making decisions on behalf of nursing facility residents. Neglect and abuse of nursing facility residents is all-too common, and nursing facilities often fail to comply with minimum standards for resident care. Even when noncompliance is detected, penalties often do not deter future abuse or neglect. In this context, a principal's delegation of authority to contract should not be seen as authorizing waiver of a resident's right to seek justice in court, and the Kentucky Supreme Court had ample reason to insist that a principal's decision to waive these rights be clearly spelled out in the operative document.

ARGUMENT

I. THE SCOPE OF AUTHORITY DELEGATED TO AN AGENT UNDER A POWER OF ATTORNEY MUST BE VIEWED WITH THE PRINCIPAL'S OBJECTIVES IN MIND.

This case turns on the scope of an agent's authority as described in a formal power of attorney document, including reasonable inferences that can be drawn from it. The use of powers of attorney is an extremely common mechanism for older adults to

empower surrogate decision-makers without resorting to formal guardianship. *See* AARP Research Grp., *Where There Is a Will: Legal Documents Among the 50+ Population*, 5 (Apr. 2000), http://assets.aarp.org/rgcenter/econ/will.pdf (finding that approximately 45% of adults age 50+ and 70% of adults age 70+ executed a durable power of attorney).

Despite Petitioners' comparisons to the contrary, the relationship between two parties through a power of attorney document is fundamentally different than the relationship between two parties through a guardianship. *Cf.* Br. for Pet'rs at 22, *Kindred Health Ctrs. Ltd. v. Clark*, No. 16-32 (Dec. 7, 2016) (stating "[i]t is also significant that Kentucky law erects no similar barriers to allowing state-appointed guardians...to enter into arbitration agreements on behalf of their wards"). As the U.S. District Court for the Eastern District of Kentucky correctly noted, "[a] guardian, unlike an attorney-in-fact, receives his power from the state—not from the ward himself." *Preferred Care, Inc. v. Howell*, No. 16-13-ART, 2016 U.S. Dist. LEXIS 110495, at *10 (E.D. Ky. Aug. 19, 2016). Thus, the use of powers of attorney is far more preferable to older adults than guardianship, as a principal can exert considerable control in selecting an agent and specifying the authority to be delegated to the agent.

Under Kentucky law, when a principal voluntarily gives up the power to manage his or her affairs to an agent via a power of attorney document, and "a court must decide whether an [agent] has the power to do something," the court must "look[] to the document to see what the principal has allowed." *Id.*

An individual empowered to make "health care decisions"[2] under Kentucky law is generally empowered to make "health care decisions for the [principal] which [the principal] could make individually if he or she had decisional capacity," so long as such decisions are made "in accordance with the desires of the [principal]" as expressed in the operative document. Ky. Rev. Stat. Ann. § 311.629(1) (LexisNexis 2016). The specific words written in the operative power of attorney document, along with the context in which they are written, constitute a "written manifestation" of the principal's intent to delegate to another the authority to manage her own affairs to another. *Ping v. Beverly Enters.*, 376 S.W.3d 581, 591 (Ky. 2012).

An understanding of the principal's intent requires an understanding of the circumstances and motivations under which the principal signed the operative power of attorney document. According to the Restatements of Agency, an agent "has actual authority to take action designated or implied in the principal's manifestations to the agent and acts necessary or incidental to achieving the principal's objectives, as the agent reasonably understands the *principal's manifestations and objectives*." Restatement (Third) of Agency § 2.02(1) (Am. Law Inst. 2006) (emphasis added).

---

[2] Kentucky law defines a "health care decision" as "consenting to, or withdrawing consent for, any medical procedure, treatment, or intervention." Ky. Rev. Stat. Ann. § 311.621(8) (LexisNexis 2016).

Durable powers of attorney are "anticipatory in nature"—that is, they are prepared with the anticipation of a future decline in competency. John C. Craft, *Preventing Exploitation and Preserving Autonomy: Making Springing Powers of Attorney the Standard*, 44 U. Balt. L. Rev. 407, 412 (Summer 2015). Health care powers of attorney provide an adult with the opportunity to memorialize specific treatment decisions and instructions in the event of his or her incapacity. David J. Doukas, M.D. et al., *Living Wills and Other Advance Directives for You and Your Family* (2d ed. 2007). Researchers identified three primary goals in executing health care powers of attorney. Brenna Kelly, *Systematic Review: Individuals' Goals for Surrogate Decision-Making*, 60 J. Am. Geriatr. Soc. 884 (May 2012). First, principals "want their close family members to make treatment decisions" because they "assume[] that family members would know their treatment preferences." *Id.* at 892-893. Second, principals want to be treated "consistently with their own preferences and values." *Id.* at 893. Finally, principals want to "minimize the burden on their families." *Id.*

For older adults, the execution of a power of attorney is generally premised on the delegation of certain necessary tasks. The principal's perception of what the power of attorney document is intended to do may influence her willingness to sign such a document in the first place. According to one study, "individuals were significantly more likely to complete advance directives when they reported a high sense of control over their lives," suggesting that "individuals who believe that executing a [power of attorney] will cede

significant control to an [agent] may be less likely to do so." Nina A. Kohn, *Elder Empowerment as a Strategy for Curbing the Hidden Abuses of Durable Powers of Attorney*, 59 Rutgers L. Rev. 1, 45 (Fall 2006) (citing Christopher B. Rosnick & Sandra L. Reynolds, *Thinking Ahead: Factors Associated with Executing Advance Directives*, 15 J. of Aging and Health 409, 424 (2003)).

Given older adults' use of power of attorney documents to authorize only the most practical decision-making authority, the Kentucky Supreme Court was justified in ensuring that older adults truly intend to delegate authority to waive fundamental rights. This is particularly clear in the context presented by this case—a claim by a nursing facility that the power of attorney document authorized the agent to sign a provision waiving the principal's right to seek a remedy in court for a future injury caused by the nursing facility's negligence.

Consider the issue from the perspective of an older adult who wishes to appoint her spouse or child as her agent. The principal is competent to choose an agent, but is concerned about losing cognitive faculties in the future. At this point in time, the principal is concerned with naming someone to oversee her day-to-day affairs, such as making her mortgage or rent payments, or managing her bank account. *See* Craft, *supra*, at 417 (recommending that "[t]o be used effectively as a tool for planning for incapacity, a [power of attorney] must give the agent broad decision-making authority over the principal's finances and property" including the power to "sell or mortgage the

principal's home, withdraw and deposit money in bank and retirement accounts, make gifts, [and] change a principal's estate plan"). The prospect that some future health care provider might abuse or neglect her at some indeterminate point in time is unlikely to be on the principal's mind at the time the document is signed.

The ruling of the Kentucky Supreme Court is entirely consistent with the practical realities of older adults executing powers of attorney. When a power of attorney document refers to "contracts," "contracting," "property rights," or similar concepts, these terms should be understood in the context of an older adult attempting to appoint someone to handle his or her necessary day-to-day affairs. In this context, it is unlikely that a principal would purposefully grant his or her agent the authority to waive certain critical rights, and such authority should not be inferred lightly.

II. THE KENTUCKY SUPREME COURT ARTICULATED A RULE THAT APPROPRIATELY REQUIRES A RIGOROUS STANDARD FOR AN AGENT'S AUTHORITY TO WAIVE FUNDAMENTAL RIGHTS.

Agents of persons who need a nursing facility simply seek to obtain medical care for their loved ones, not to waive fundamental rights. As noted by the Kentucky Supreme Court, arbitration agreements create legal consequences that are "significant and separate" from other powers specified in a power of

attorney document. *Kindred Nursing Ctrs. v. Clark*, 2013-SC-000426, slip op. at 12 (Ky. Sept. 24, 2015).

Whether a power of attorney document authorizes an agent to waive or contract away a fundamental right is a fact-intensive issue that state courts are well-equipped to resolve. The Kentucky Supreme Court correctly noted that, because the authority delegated to an agent will vary in its express terms, each power of attorney document "requires a separate analysis" of its meaning and context. *Id.* at 9. The scope of an agent's authority is "strictly construed" by Kentucky courts, including only (1) "powers which are plainly given" in the operative power of attorney document, and (2) powers that are "necessary, essential, and proper" to carry out express powers granted to the agent. *U.S. Fid. & Guar. Co. v. McGinnis Admin.*, 147 Ky. 781, 786-87 (Ky. 1912). Kentucky courts have long refused to extend the scope any further than that which is "necessary, essential, and proper" to achieve the duties described in the document. *Id.*

In Kentucky, the terms of an agency relationship are not construed in isolation, but rather in context "with reference to the types of transactions expressly authorized in the document." *Kindred Healthcare, Inc. v. Goodman*, No. 2014-CA-000589, 2015 Ky. App. Unpub. LEXIS 348, at *8 (May 15, 2015) (citing *Ping*, 376 S.W.3d at 591-92). For example, Kentucky courts have refused to infer that an agent with the power to "execute and deliver any and all papers" on behalf of the principal has the authority to sign an arbitration agreement where the

remainder of the document strictly discusses management of the principal's "business and financial affairs." *Goodman* at *9.

Given the virtually unlimited authority that can be delegated to an agent in a power of attorney document, it is reasonable—if not advisable—for a state to ensure that certain rights, including, but not limited to, the right to access the court system, are carefully safeguarded from unintended delegation. Durable power of attorney documents can grant agents an enormous amount of power, including the power to sell the principal's home and other tangible assets, to make investments on the principal's behalf, to cancel insurance policies or name new beneficiaries, and even to empty bank accounts. Jennifer L. Rhein, Note: *No One in Charge: Durable Powers of Attorney and the Failure to Protect Incapacitated Principals*, 17 Elder L.J. 165, 168 (2009). Moreover, agents under powers of attorney can operate with "vast, largely unsupervised discretion." Craft, *supra*, at 411. Left unchecked, overbroad interpretations of power of attorney documents can lead to disastrous personal and financial consequences for principals.

This is not to suggest that agents generally intend to overstep their authority or cause harm to their principals; without a doubt, many agents act out of genuine and selfless concern for their loved ones who are unable to make decisions for themselves. However, even the most well-intentioned agent can be confused by broad language in a power of attorney document that leaves little

guidance to the agent as to how the principal would act in specific situations. Linda S. Whitton, *Understanding Duties and Conflicts of Interest—A Guide for the Honorable Agent*, 117 Penn. St. L. Rev. 1037, 1044 (2013). To prevent the intentional or accidental over-extension of an agent's authority, a state, as a matter of public policy, can and should set a "back-stop" and demand that the delegation of certain fundamental rights be specifically identified in the power of attorney document. Br. of Resp. in Opp. to Pet. for Cert., *Kindred Health Centers Ltd. v. Clark*, No. 16-32, 24 (Sept. 6, 2016).

That state courts may choose to set limits on their ability to imply an agent's authority is by no means exclusive to arbitration clauses or to nursing facilities. For example, the Kentucky Court of Appeals has held that a power of attorney document granting an agent the broad authority to "convey any real or personal property" to a trust does not imply the authority for the agent to create the trust itself or to name herself as trustee. *Dishman v. Dishman*, 2015 Ky. App. Unpub. LEXIS 874, at *49-50 (May 1, 2015) (stating that "in order for an [agent] to create a trust pursuant to a [power of attorney], this authority must be expressly provided for in the instrument if it contains a provision related to trusts").

This is not a case that concerns whether a state may strike down or disfavor arbitration agreements solely because they are arbitration agreements. The Court's precedents on this point are clear that a state may not do so. *See Marmet Health*

Care Ctr., Inc. v. Brown, 565 U.S. 530, 532 (2012) (overruling the West Virginia Supreme Court of Appeals' categorical refusal to enforce arbitration agreements in cases alleging personal injury or wrongful death claims against nursing homes); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011) (overruling California law that deemed class-arbitration waivers unenforceable). Rather, this case stands for the proposition that states may set basic limits on what it will and will not infer an agent's authority to be.

The specific context of arbitration in nursing facilities, while not the exclusive situation in which states should hesitate to infer an agent's authority, provides a clear example of why a state may want to do so. Family members making critical decisions on behalf of their loved ones are under pressure to quickly find a long-term care placement because the need for such placement arises quickly and often is unplanned, leaving little time to investigate other options. Denese A. Vlosky et al., *"Say-so" As a Predictor of Nursing Home Readiness*, 93 J. Fam. & Consumer Sci. 59 (2001). The residents or their representatives are often unable to review the admission contract in full and contemplate the meaning and ramifications of each of its many provisions, particularly those that have nothing to do with the actual care and services provided by the facility or the costs charged by the facility. Many residents and their families are unaware they have signed such a document until after a dispute arises. Laura M. Owings & Mark N. Geller, *The Inherent Unfairness of Arbitration Agreements in Nursing*

Home Admission Contracts, 43 Tenn. B.J. 20 (March 2007).

In recognition of the obstacles that arbitration agreements can pose to individuals seeking nursing facility care on behalf of themselves or their loved ones, the federal Centers for Medicare and Medicaid Services (CMS) sought to ban these agreements from the admission documents of nursing facilities accepting reimbursement from federal health insurance programs. Ctrs. for Medicare and Medicaid Servs., U.S. Dep't of Health and Human Servs., *Final Rule: Medicare and Medicaid Programs, Reform of Requirements for Long-Term Care Facilities*, 81 Fed. Reg. 68,688, 68,690 (Oct. 4, 2016) (hereinafter *CMS Final Rule*). Specifically, CMS recognized that "voluntary post-dispute arbitration agreements" (as opposed to the binding, pre-dispute agreements that are the subject of this case) are "the best way to balance the policy favoring arbitration with the need to protect [residents] from unfairly waiving their rights to a jury trial." *Id.* at 68,796.[3]

---

[3] The enforcement of this Rule has been temporarily enjoined by a federal court. *Am. Health Care Ass'n v. Burwell*, No. 16-cv-00233, 2016 U.S. Dist. LEXIS 154110 (N.D. Miss. Nov. 7, 2016). In dicta, the court questioned the "efficiency and fairness of the nursing home arbitration system." *Id.* at 6.

III. THE RIGHT TO ACCESS THE COURTS IS CRITICAL TO THE MANY VICTIMS OF ELDER ABUSE AND NEGLECT IN NURSING FACILITIES.

The specific context of this case illustrates why the Kentucky Supreme Court is justified in requiring explicit language before inferring an agent's authority to waive the principal's fundamental rights. The unfortunate reality is that nursing facility residents often suffer injury due to substandard care. As a group, nursing facility residents are more vulnerable to abuse and neglect due to their isolation from social networks, their congregate living setting, and their dependence on others to perform activities of daily living (ADLs), such as eating, bathing, dressing, and toileting, and their cognitive impairments. *See* Nat'l Research Council, *Elder Mistreatment: Abuse, Neglect, and Exploitation in an Aging America*, 88-103 (Richard J. Bonnie & Robert B. Wallace eds., 2003) (reviewing studies on risk factors for abuse in different settings) (hereinafter *Elder Mistreatment*). Nationwide, more than 70% of nursing facility residents require assistance with two or more ADLs while more than 60% of nursing facility residents nationwide experience moderate to severe cognitive impairments. Ctrs. for Medicare and Medicaid Servs., U.S. Dep't of Health and Human Servs., *Nursing Home Data Compendium 2015 Edition*, 156, 185 (2015) (hereinafter *2015 Compendium*), https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/CertificationandComplianc/

Downloads/nursinghomedatacompendium_508-2015.pdf.

National databases of agencies tasked with enforcing minimum standards of safety in nursing facilities provide evidence of the significant levels of abuse and neglect occurring in nursing facilities. Approximately 7% of all complaints to the long-term care ombudsmen regarding nursing facilities were complaints of abuse, gross neglect, or exploitation. *See* U.S. Admin. on Aging, *2013 National Ombudsman Reporting System Data Tables*, Tbl. B-2, Tab A (2013), https://aoa.acl.gov/AoA_Programs/Elder_Rights/Ombudsman/National_State_Data/2013/Index.aspx. In 2014, state inspections that determine a facility's compliance with health and safety regulations revealed that over 10% of the facilities surveyed were cited for causing actual harm to residents or putting them in immediate jeopardy, 3.2% for providing substandard care, 4.3% for using physical restraints, and 12.8% for failure to prevent or treat bedsores. *2015 Compendium* at 51, 114, 126, 138.

Furthermore, this data may underrepresent the scope of the problem. The complex challenges of collecting complete data on the prevalence of abuse in nursing facilities means that existing data, already showing unacceptable levels of abuse and neglect, capture only a small sliver of a vastly under-detected problem. *Elder Mistreatment* at 101; *see also Elder Justice and Protection: Stopping the Abuse: Hearing Before the Subcomm. on Aging of the Comm. on Health, Educ., Labor, and Pensions*, 108th Cong.

(Aug. 20, 2003) (statement of Sen. Christopher S. Bond, Chairman).

Even where a deficiency is detected and penalized, the administrative action may not have the desired deterrent effect on the facility against committing similar violations in the future. The Director of Health Care for the United States Government Accountability Office (GAO) testified before Congress that "[a] small but significant proportion of nursing homes nationwide continue to experience quality-of-care problems – as evidenced by the almost 1 in 5 nursing homes nationwide that were cited for serious deficiencies in 2006." U.S. Gov't Accountability Office, GAO-07-794T, *Nursing Home Reform: Continued Attention Is Needed to Improve Quality of Care in Small but Significant Share of Homes* 9 (2007), http://www.gao.gov/new.items/d07794t.pdf. It is quite clear that, despite efforts by federal authorities to strengthen their enforcement efforts, several nursing homes continue to repeatedly harm residents, and any sanctions imposed against these facilities "may have induced only temporary compliance in these homes." *Id.* at 15.

A 2007 GAO report on federal enforcement efforts further concludes that nursing facilities with the most serious quality problems—representing about half of the total sample—"cycled in and out of compliance" and continued to harm residents. U.S. Gov't Accountability Office, GAO-07-241, *Efforts to Strengthen Federal Enforcement Have Not Deterred Some Homes from Repeatedly Harming Residents* 26

(2007), http://www.gao.gov/new.items/d07241.pdf. The types of deficiencies found in the facilities that cycled in and out of compliance included inadequate treatment or prevention of pressure sores, resident abuse, medication errors, and employing individuals previously convicted of abuse. *Id.* at 68. Further study by the GAO revealed that the total number of deficiencies increased over the previous several years, particularly in for-profit and multi-facility chains. U.S. Gov't Accountability Office, GAO-11-571, *Nursing Homes: Private Investment Homes Sometimes Differed from Others in Deficiencies, Staffing, and Financial Performance*, at Highlights (2011), http://www.gao.gov/assets/330/321067.pdf.

Nursing facilities routinely include binding pre-dispute arbitration provisions in admission agreements with the primary and unequivocal goal to reduce their overall exposure to legal liability. *See* Kelly Rice-Schild, *The Fairness in Nursing Home Arbitration Act: Hearing on S. 2838 Before the S. Subcomm. on Antitrust, Competition Pol'y, and Consumer Rights of the S. Comm. on the Judiciary and the Spec. Comm. on Aging*, 110th Cong., 2 (June 18, 2008), http://www.ahcancal.org/advocacy/testimonies/Testimony/AHCA_NCAL_StatementofKRSonArbitration.pdf; Aon Risk Sols., *Long Term Care General Liability and Professional Liability Actuarial Analysis*, 10 (2015), https://www.ahcancal.org/research_data/liability/Documents/2015%20General%20Liability%20and%20Professional%20Liability%20Actuarial%20Analysis%20Report.pdf (concluding that the resolution of claims with arbitration agreements in place cost 7% less than other claims).

Appellants have a particular incentive to use arbitration agreements in Kentucky, where both the frequency and average cost of claims tend to be higher. *Id.* at 30-31.

One of the primary goals of tort law, whether inside our outside a health care context, is to "deter the defendant from continuing its tortious conduct based on the risk that others injured will sue." Jill L. Lens, *Tort Law's Deterrent Effect and Procedural Due Process*, 50 Tulsa L. Rev. 115, 118 (2014). The introduction of an arbitration model to resolve medical malpractice claims, however, can undercut that goal. David Shieh, *Unintended Side Effects: Arbitration and the Deterrence of Medical Error*, 89 N.Y.U. L. Rev. 1806 (2014). In particular, the arbitration process can be "particularly susceptible to bias in favor of defendant healthcare providers." *Id.* at 1823-1824. When a tortfeasor cannot foresee any consequences for its practices causing harm to others, it has little, if any, incentive to correct the underlying practices.

As some commenters have observed, "the operating assumption of courts is not just that they will be there to...compensate an injured party, but that they will be sending a message heard clearly by those engaged in similar market practices." Andrew F. Popper, *In Defense of Deterrence*, 75 Alb. L. Rev. 181, 191 (2011). The total removal of a claim from the public court system stifles that message. As noted by CMS, many patient advocates reported that facilities employing arbitration clauses frequently believed that "they were immune to any legal

consequences" for mistreatment of residents "because of the likelihood they would prevail in binding arbitration." CMS Final Rule, 81 Fed. Reg. at 68,793. CMS also expressed concern that the mere existence of an arbitration agreement may deter residents from pursuing otherwise meritorious claims if "a resident or their representative does not believe that arbitration is a fair process." *Id.* at 68,794.

Given the high rates of abuse in nursing facilities, coupled with the inability of traditional administrative penalties to protect residents, lawsuits by nursing facility residents and their representatives can be critical tools in the battle against the abuse and neglect of older adults.

CONCLUSION

For the foregoing reasons, amici respectfully submit that the decision of the Kentucky Supreme Court should be affirmed.

Dated: January 13, 2017

Respectfully submitted,

William Alvarado Rivera*
**Counsel of Record*
AARP FOUNDATION LITIGATION
601 E Street, N.W.
Washington, D.C. 20049
Tel. (202) 434-3392
warivera@aarp.org
Counsel for Amici Curiae